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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DENNIS ROTTINO, Defendant and Appellant.	G040295 (Super. Ct. No. 06CF2359) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert Dennis Rottino appeals his conviction on six counts of insurance fraud (Pen. Code, § 550, subds. (a)(1), (4) & (5))[1], and one count of falsely reporting a crime (§ 148.5, subd. (a)). He contends the court erred by instructing the jury with CALCRIM Nos. 223 and 302, claiming these instructions prejudicially undermined the presumption of innocence and shifted the burden of proof to defendant.

We find defendant's contentions lack merit. The record shows the jury was appropriately instructed on both the presumption of innocence and the burden of proof. We therefore affirm the judgment.

FACTS

In February 2004, defendant worked for Area 51, a distributor of electronic components. On Friday, February 20, 2004, he was unexpectedly called away from work. When he left, his keys and wallet were still on his desk and his red Ford Focus was parked out front. He was gone for around 20 days.

On Monday, February 23, 2004, defendant's car was still parked at Area 51. Defendant called work and asked coworker Jerry Aguins to give Howard Carter, defendant's roommate and lover, defendant's wallet and keys. Aguins, who was not authorized to give anyone defendant's belongings, passed the call to Peter Gosselin, the manager. Defendant also asked his boss, Steven Shammah, the owner of Area 51, to deposit his paycheck and to give his car to Carter.

On Tuesday, February 24, 2004, Carter went to Area 51 to pick up defendant's belongings from Gosselin. Shammah, Aguins, and a number of other employees were out front taking a cigarette break. As they smoked, they watched Carter drive off in defendant's car. Susan Wiedner, Area 51's human resources director, also watched Carter leave in defendant's car. This was not the first time Carter had driven the

[1] All further statutory references are to the Penal Code.

red Ford Focus; Shammah, Wiedner, and Aguins had all seen Carter drop defendant off at work in the past in defendant's car.

Later that day, California Highway Patrol Officer Mark Magrann found defendant's badly damaged car in the canal adjacent to the Glassell Street off-ramp on the 91 Freeway. Officer Magrann ran the license plate and found that the car was registered to defendant at the Area 51 address, had not been reported stolen, and noted it bore no signs of theft.

When Officer Magrann attempted to locate defendant at Area 51, Wiedner gave him defendant's home address. Unable to contact anyone at defendant's residence, about a quarter of a mile from where he had found defendant's car, Officer Magrann left a traffic collision card on the apartment door.

Wiedner later told defendant his car had been in an accident and there was a CHP officer looking for him. Defendant responded, "That fucking Howard wrecked my car." While defendant was away from work, he called Area 51 almost every day. During his calls, he made various statements to Aguins, Wiedner, and Shammah that he knew "[t]he fucking kid crashed my car off the freeway," and that he was going to report the car stolen.

When defendant returned to work, he told Shammah that although Carter had crashed the car, defendant reported his car stolen so Carter would not get in trouble. Carter was not a licensed driver at the time of the accident. Defendant told Wiedner he had reported the car stolen and told Aguins he thought he would get "a bunch of money," but the insurance company only paid off the car.

On March 10, 2004, defendant made a claim against his Coast National Insurance policy, claiming the car had been stolen. On March 12, 2004, in a telephone statement to an insurance agent, he reported his car had been stolen. At the direction of the insurance company, he made a stolen vehicle report with the City of Orange Police

Department on April 16, 2004. On April 26, 2004, the insurance company requested an affidavit of theft, which he provided.

The insurance company determined the car to be a total loss. Because there was an outstanding loan on the car in excess of its actual value, the insurance company directly paid the lienholder the current value of the car. The insurance company received $775 for salvage, and defendant received nothing.

At trial, a field investigator for Coast National Insurance testified that defendant's insurance policy did not cover collisions caused by unlicensed drivers. In addition, the entire policy was void if defendant concealed or misrepresented any material facts or committed fraud.

Defendant was fired from Area 51 on May 27, 2005. Shammah instructed Wiedner to contact the district attorney's office to report defendant's insurance fraud after receiving a demand letter regarding funds owed to him by Area 51.

I

Defendant argues the jury instructions in this case were inadequate. The People contend defendant forfeited his challenge by failing to object to the flawed instructions in the trial court. However, under section 1259, we must consider challenges to instructions even when no objection was made in the lower court "'if the substantial rights of the defendant were affected thereby.'" (*People v. Stitely* (2005) 35 Cal.4th 514, 556, fn. 20.) We therefore consider the issue on the merits.

II

The correctness of jury instructions is a question of law that we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964 (*Smithey*).) Instructions are considered "as a whole, in light of one another," without "singl[ing] out a word or phrase," and we assume the jurors are intelligent persons,

"""capable of understanding and correlating""" all given instructions. (*People v. Holmes* (2007) 153 Cal.App.4th 539, 545-546.) The arguments of counsel must also be considered in assessing the probable impact of the instruction on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

The jury was instructed with CALCRIM No. 223 as follows: "Facts may be proved by direct or circumstantial evidence or by a combination of both. . . . [¶] Both direct and circumstantial evidence are acceptable types of evidence *to prove or disprove the elements of a charge*, . . . and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Italics added.) Defendant argues that saying the purpose of evidence is to "prove or disprove the elements of a charge" suggests that defendant must disprove an element of the charged offense, not just raise a reasonable doubt, to merit an acquittal.

Additionally, the jury was instructed with CALCRIM No. 302 as follows: "If you determine that there is a conflict in the evidence, *you must decide what evidence, if any, to believe.* Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point." (Italics added.) Defendant argues that instructing jurors to "decide what evidence, if any, to believe" implies that defendant must point to believable exculpatory evidence in order to avoid conviction. According to defendant, the highlighted portions of the above instructions imply that the defendant carries a burden of proof, thus violating defendant's due process rights. We disagree.

It is true that the prosecution bears the burden of proving every element of an offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) A jury

instruction that runs contrary to that principle violates due process. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520, abrogated on another ground by *Boyde v. California* (1990) 494 U.S. 370, 390.) But we find no indication these instructions do that.

CALCRIM No. 223 instructs the jury on evaluating direct and circumstantial evidence. The instruction informs the jury that both types of evidence are an acceptable means of proof that may either establish or defeat the charge. (CALCRIM No. 223.) A defendant may offer evidence to negate or "disprove" an element of a charge, but he is not required to do so. This instruction only establishes that, if a defendant does choose to offer evidence, that evidence may be either direct or circumstantial, and neither type of evidence is necessarily more reliable than the other. The instruction neither states, nor implies, that a defendant has the burden to disprove a charge. Defendant takes the phrase "disprove the charge" out of context to imply otherwise. When read as a whole, CALCRIM No. 223 does not suggest that defendant must disprove the case against him, and does not undercut the People's burden of proof.

CALCRIM No. 302 instructs jurors on evaluating conflicting evidence. In his argument regarding CALCRIM No. 302, defendant analyzes "believe" in isolation to argue it saddles defendant with the burden of pointing to believable exculpatory evidence, thereby undermining the presumption of innocence. But again, we do not see it that way.

The jury has the "unquestioned role as the determiner of factual issues." (*Jones v. U.S.* (1999) 526 U.S. 227, 247 fn. 8; CALCRIM No. 200.) Where there is conflicting evidence, the process of reaching a verdict "necessarily entails rejection of some evidence in favor of other evidence." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) Asking jurors to decide what evidence is more credible or "believable" does nothing more than affirm the role of the jury.

Defendant distorts the meaning of the phrase "decide what evidence, if any, to believe" in CALCRIM No. 302. A full, contextual reading of CALCRIM No. 302

shows that this instruction plainly and correctly instructs the jurors that when they are presented with conflicting evidence, they must decide what evidence, "if any," to believe. (CALCRIM No. 302.) The phrase "if any" indicates the jury is *not* required to believe exculpatory evidence presented by the defendant in order to find reasonable doubt. Defendant's interpretation of CALCRIM No. 302 appears to imply that the jury is required to believe one side or the other, when the instruction clearly states that the jury has the option to believe neither side.

We look to the entire charge of the jury when determining whether the jury was correctly instructed. (*Smithey*, *supra*, 20 Cal.4th at p. 963.) Here, in addition to the challenged instructions, the jury was preinstructed with CALCRIM No. 100, that the defense may present evidence but is not required to do so, and that the defendant is presumed innocent and does not have to prove he is not guilty. The jury was also preinstructed with CALCRIM No. 103 as to the presumption of innocence, the People's burden of proving each element of the charged crimes and allegations beyond a reasonable doubt, and the definition of reasonable doubt. The jury started out with a full and clear understanding of both the presumption of innocence and the People's burden of proof.

Following trial, the jury was instructed with CALCRIM No. 220 as to the presumption of innocence and the People's burden of proving every element beyond a reasonable doubt. The jury was instructed with CALCRIM No. 224 as to the sufficiency of circumstantial evidence, including the requirement the jury must be convinced the People have proved each element beyond a reasonable doubt to find the defendant guilty. The jury was instructed with CALCRIM No. 355, that the defendant has a right not to testify and may instead rely on the state of the evidence to argue that the People have not met their burden of proving the charges beyond a reasonable doubt. The jury was instructed with CALCRIM No. 359, reminding the jury that the People must prove defendant's guilt beyond a reasonable doubt before it can convict defendant. The jury

was also instructed with CALCRIM No. 375, explaining that, while the prior uncharged act was subject to a preponderance of the evidence, "[t]he People must still prove each element of every charge beyond a reasonable doubt." Moreover, as to each of the charged crimes, the jury was instructed as to the specific elements that the People were required to prove.

Arguments to the jury reinforced those instructions. The prosecutor stated that the defendant's guilt must be proven beyond a reasonable doubt. Defense counsel repeatedly emphasized that standard in his argument. After objection by defense counsel that the prosecutor's rebuttal argument may have suggested a different burden of proof, the trial court once more admonished the jury as to the People's burden of proof.

In light of the entire charge to the jury, we conclude it was not reasonably likely the jury misinterpreted CALCRIM No. 223 as requiring the defendant to disprove an element of the crime. Similarly, in light of the entire charge, we conclude it was not reasonably likely the jury misinterpreted CALCRIM No. 302 as shifting the burden of proof. Thus, we find no instructional error.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.